

National Aeronautics and Space Administration

Headquarters

Washington, DC 20546-001



March 14, 2019

Reply to Attn of:

Office of the General Counsel

Emma Best
MuckRock News
DEPT MR 63908
411A Highland Avenue
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63908-11534869@requests.muckrock.com

Re: Consolidated Disposition of Appeals on FOIAs 19-HQ-F-00118 and
19-HQ-F-00119

Dear Ms. Best:

By letters dated January 3, 2019 (FOIA 19-HQ-F-00118) and December 19, 2019 (FOIA 19-HQ-F-00119), you appealed the determinations of the NASA FOIA Office to place your requests in the "all others" category for applying search and duplication fees relating to your requests. Because these two appeals present identical questions, disposition of your appeals has been consolidated for determination. This letter is NASA's final determination of the two above-referenced appeals.

BACKGROUND

FOIA 19-HQ-F-0118:

On November 21, 2018, you requested records "mentioning TeaMp0isoN," a hacking group that came to public attention in 2011/2012 after hacking the systems of several government agencies and commercial companies.

FOIA 19-HQ-F-00119:

On November 17, 2018, you requested records "mentioning The Unknowns," a hacking group that came to public attention in May 2012 after exploiting weaknesses in the security of several government agencies.

In both requests, you assert your status as a representative of the news media and request, in addition, that any remaining charges be waived. The HQ FOIA Office placed your requests in the "all others" category (which differs from the "news media" category only in that "news media" are not charged search fees and "all others" must pay search fees after the first two

hours. 14 CFR § 1206.507(b). The HQ FOIA Office also declined your requests for fee waivers.

DETERMINATION ON APPEAL

Your appeals have been reviewed and processed pursuant to applicable statutes, including the FOIA, 5 U.S.C. § 552, and NASA's FOIA regulations, 14 CFR Part 1206. The process involved an examination of your original requests, all related correspondence, the determination of fee status, and your appeal. I find that the decision by the HQ FOIA Office to place you in the "all others" category is consistent with law and NASA's FOIA regulations and that the HQ FOIA Office appropriately exercised its discretion by declining your requests for fee waivers. The initial determinations made by the HQ FOIA Office in the above-captioned matters are affirmed.

DISCUSSION

In your appeals, you cite a number of court cases supporting your contention that a history of freelance publication, a reasonable expectation of publication based on the results of the FOIA search and a stated intent to publicly post any records provided in response to your requests is sufficient to establish your status as a representative of the "news media." You also argue that you were provided "news media" status on an earlier FOIA request and that the earlier determination should be dispositive in determining your requester status on these and future FOIA requests. Finally, you quote the FOIA statute, 5 U.S.C. § 552(a)(4)(A)(ii)(II), arguing that the determination as to whether a requester is considered a "representative of the news media" is based on the identity of the requester and not the nature of the request.

The FOIA contains a definition of "representative of the news media" to assist agencies in making an appropriate requester determination.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. *In this clause, the term "news" means information that is about current events or that would be of current interest to the public.* Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. ... *A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is*

actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

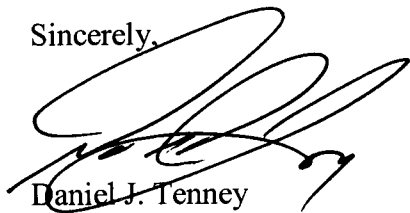
5 U.S.C. § 552(a)(4)(A)(ii)(III) (emphasis supplied). NASA's regulations conform to this definition and specifically state that the determination whether a particular requester is a "representative of the news media" is made on a case-by-case basis based on the specifics of the request and the requester's intended use. 14 C.F.R. § 1206.507(c)(3).

First, simply aggregating and posting records released under FOIA does not entitle a requester to status as a "representative of the news media." Further, you have provided no evidence that the records you are seeking – relating to activities in the 2011-2012 time frame - would contribute to a work falling within the definition of "news" such that any work you would create would "communicate information about current events or that would be of current interest to the public," as required by the FOIA. Finally, you have not demonstrated a "solid basis" that your work relating to these requests will be published by a news-media entity such that you, as a freelance journalist, would be considered to be "working" for that entity in making your request under the statute.

For these reasons, and because it is appropriate for the HQ FOIA Office to make determinations regarding whether a requester is a "representative of the news media" on a case-by-case basis based on the request, rather than the requester, I affirm the determination of the HQ FOIA Office to place your requests into the "all others" fee category.

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,



Daniel J. Tenney
Associate Administrator
Mission Support Directorate
Attachment

Freedom of Information Act, Section 552(a)(4), as amended

(I)

if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II)

for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v)

No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi)

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii)

In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)

An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B)

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C)

Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D)]

Repealed. Pub. L. 98-620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)

(i)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

Freedom of Information Act, Section 552(a)(4), as amended

(I)

a judicial order, or an enforceable written agreement or consent decree; or

(II)

a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)

(i)

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I)

notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II)

annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii)

The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G)

In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.